

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

C.A. No. 05 11267 MEL

MADHU JAIN,)
PLAINTIFF)
v.)
A CAPE ANN WHALE)
WATCH, INC.)
DEFENDANT)

**OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 804 (6) TO EXCLUDE
MEDICAL REPORT OF DR. LHOWE**

As an operating trauma surgeon at M.G.H. Dr. Lhowe regularly writes evaluative reports. This is part of his practice and these reports are kept in the regular course of his practice. He certifies this to be true in his certification of them as regularly kept records of regularly activity (Exhibit 1).

In his certification Dr. Lhowe states, "the reports were necessary according to good medical practice" and were "reports of examination and treatment". (Exhibit 1)

Under Rule 803 (4):

**HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT
IMMATERIAL**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness;

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

To require that the plaintiff forgo this opinion would deprive her of some of the most reliable and probative evidence available. The doctor had complete freedom to write whatever he wanted.

The doctor is a practicing senior surgeon (and Harvard Assistant Professor and author) to make him appear in Court would deprive his patients of his time and promote

the reluctance of so many surgeons to get involved in any matter that would pull them away from their practice (Exhibit 2).

A review of his c.v. Demonstrates that he does not exclusively perform medical evaluations, but as an expert, he is often referred patients by other doctors who desire his expertise.

Defendant's Motion is not based on any facts that show that the medical records were not kept in the regular course of business or that the examining orthopedic surgeon had motivation to lie or that the records are self-serving.

The method of their preparation was to record information and diagnosis based on first hand knowledge and on information communicated by Ms. Jain of the type generally given for the purpose of treatment.

The circumstances of preparation do not indicate lack of trustworthiness. They were made at or near the time of the examination. The examination and diagnosis treatment is a regular part of an orthopedic doctor's practice.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with **Rule 902(11)**, **Rule 902(12)**, or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Defendant's objection is a challenge to the certification of these records as business records. He has no evidence that anything in the certification is not true.


Defendant could have cross-examined the doctor if he had noticed his deposition and cross-examined him. Defendant had the plaintiff examined by two doctors of his choosing. No circumstances or method here indicates a lack of trustworthiness or unfairness.

Dr. Lhowe regularly writes evaluative reports because he is involved in treating orthopedic trauma patients on a regular basis. He is trustworthy and any doubt as to the

trustworthiness of these records should reflected in the weight the Court gives them, not in their admissibility. If a part or parts of the records is objectionable it may be stricken.

HEREFORE, the plaintiff respectfully moves that the defendant's motion be denied.

By the Plaintiff,


JEFFREY C. CONIARIS
BBO# 555907
84 State Street
Boston, MA 02109
(617) 720-5888

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party and any party appearing pro se by ~~first class mail, postage prepaid~~ or (by hand delivery).

Dated 6/6/07 



MASSACHUSETTS
GENERAL HOSPITAL



HARVARD
MEDICAL SCHOOL

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David W. Lhowe, M.D.
*Department of Orthopedic Surgery
Fracture Care
Joint Replacement Surgery*

I hereby certify that the attached medical records and reports of examination and treatment which are attached and which contain statements of diagnosis, prognosis, disability and causation, were prepared incidental to medical treatment rendered by me for injuries sustained by Madju Jain; and that the treatment rendered to Madju Jain as set forth in the above-referenced reports were necessary according to good medical practice.

Subscribed and Sworn to Under the Pains and Penalties of Perjury this 11th day of May, 2007.

David W. Lhowe, M.D.
David W. Lhowe

LICENSURE AND CERTIFICATION

1980-	Massachusetts Medical Licensure
1996-2001	New Hampshire Medical Licensure
1988	American Board of Orthopaedic Surgery
1999	Recertified (through 2010)
2000	Advanced Trauma Life Support, Provider
2000	Advanced Trauma Life Support, Instructor

ACADEMIC APPOINTMENTS

1985	Senior Fellow in Orthopedic Surgery, University of Washington
1986-2001	Instructor in Orthopaedic Surgery, Harvard Medical School
2001-	Assistant Professor in Orthopaedic Surgery, Harvard Medical School

HOSPITAL APPOINTMENTS

1984	Assistant in Orthopaedics Massachusetts General Hospital, Boston MA
1985	Senior Orthopedic Fellow Harborview Medical Center, Seattle WA
1986-1990	Chief, Department of Orthopaedic Surgery The Cambridge Hospital, Cambridge MA
1986	Staff Physician, Department of Orthopaedic Surgery Harvard Community Health Plan, Boston MA
1986-1998 2003-2005	Staff Physician, Department of Surgery Mt. Auburn Hospital, Cambridge MA
1986-1992	Staff Physician, Department of Orthopaedic Surgery Brigham and Womens Hospital, Boston MA
1986-	Staff Physician, Department of Orthopaedic Surgery Massachusetts General Hospital, Boston MA
2003-	Staff Physician, Department of Orthopedic Surgery Winchester Hospital, Winchester, MA

OTHER PROFESSIONAL POSITIONS

1994	Orthopedic Consultant , Ministry of Health Kingdom of Abu Dhabi
1999-	Chief Orthopedic Officer International Medical – Surgical Response Team United States Department Homeland Security
2001	Founding Member Department of Homeland Security

VOLUNTEER SERVICE

1998	AmeriCares Orthopedic Surgery and Teaching University Hospital Prishtina, Kosovo
2001	International Medical-Surgical Response Team Orthopedic Emergency Care World Trade Center, New York City
2005	Project HOPE / US Navy Orthopedic Surgery for Tsunami Victims Banda Aceh, Indonesia

HOSPITAL SERVICE RESPONSIBILITIES

1986-1989	Chairman, Department of Orthopedic Surgery The Cambridge Hospital, Cambridge MA
1992-1994	Assistant Chief, Orthopaedic Trauma Service Massachusetts General Hospital, Boston MA
1994-2001	Chief, Orthopaedic Trauma Service Massachusetts General Hospital , Boston MA

MAJOR ADMINISTRATIVE RESPONSIBILITIES

1986-1992	Course Director, Primary Care Orthopedics Department of Continuing Medical Education Harvard Medical School, Boston MA
1996-2001	Co-Chairman, Residency Selection Committee Harvard Combined Orthopaedic Residency Program
1996-2000	Director, Orthopaedic Trauma Fellowship Massachusetts General Hospital, Boston MA

MAJOR COMMITTEE ASSIGNMENTS

Harvard Medical School

1989-1997	Member, Continuing Education Committee
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Harvard Combined Orthopaedic Residency Program

1995-2001	Member, Residency Selection Committee
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Affiliated Institutions

1986-1989	Member, Hospital Executive Committee The Cambridge Hospital, Cambridge MA
1990-2002	Member, Trauma Executive Committee Massachusetts General Hospital, Boston MA
1995-1997	Member, Trauma Implant Committee Massachusetts General Hospital, Boston MA
1995-1998	Member, Administrative Redesign Committee Operations Improvement Initiative Massachusetts General Hospital, Boston MA
1996-1998	Member, Operating Room Restructuring Team Operations Improvement Initiative Massachusetts General Hospital, Boston MA

1996-1998	Chairman, Compensation Committee Orthopaedic Associates Massachusetts General Hospital, Boston, MA
1998-2001	Member, Compensation Committee Orthopaedic Associates Massachusetts General Hospital, Boston MA
2001- 2004	Member, Managed Care and Contracting Committee Massachusetts General Hospital, Boston, MA
 National	
1999-2000	Member, Field Test Task Force American Board of Orthopaedic Surgery
2000-2002	Member, Annual Program Committee Orthopaedic Trauma Association
2002-	Member, Ad Hoc Committee on Mass Casualty Orthopaedic Trauma Association

PROFESSIONAL SOCIETIES

1988-	New England Trauma Study Group
1989-	AO Alumni Association
1989-	Massachusetts Orthopaedic Association
1990-	American Academy of Orthopaedic Surgeons
1990-	AO North America Faculty
1990-	Orthopaedic Trauma Association
1998-	Orthopedics Overseas

EDITORIAL BOARDS

1992-	Consulting Reviewer (Trauma) Journal of Bone and Joint Surgery
1993-	Consulting Reviewer (Trauma) Clinical Orthopaedics and Related Research

AWARDS AND HONORS

1977	Alpha Omega Alpha
1978	Noether Award for Excellence in Therapeutics Case Western Reserve University
2005	Teacher of the Year Harvard Orthopaedic Residency Program

BIBLIOGRAPHY

ORIGINAL REPORTS

1. Lhowe DW, Ehrlich MG, Chapman PH, Zaleske DJ. Congenital Intraspinal Lipomas : Clinical Presentation and Response to Treatment. *Journal of Pediatric Orthopaedics* 1987; 7:531-7.
2. Lhowe DW, Hansen ST. Immediate Nailing of Open Fractures of the Femoral Shaft. *Journal of Bone and Joint Surgery* 1988; 70A:812-20.
3. Rodgers WB, Lhowe DW. Retrograde Intramedullary Nailing of the Femur. *Bull Hosp Joint Diseases* 1996; 55(2):78-80.
4. Rodgers WB, Kharrazi FD, Waters PM, Kennedy JG, McKee M, Lhowe DW. The Use of Osseous Suture Anchors in the Treatment of Severe, Complicated Elbow Dislocations. *American Journal of Orthopaedics* 1996; 25(11):794-8.
5. Kharrazi FD, Rodgers WB, Kennedy JG, Lhowe DW. Parturition-Induced Pelvic Dislocation : A Report of 4 Cases. *Journal of Orthopaedic Trauma* 1997; 11(4):277-281.
6. Cove JA, Lhowe DW, Jupiter JB, Siliski JM,. The Management of Femoral Diaphyseal Nonunions. *Journal of OrthopaedicTrauma* 1997; 11(7):513-520.
7. Lonner JH, Siliski JM, Jupiter JB, Lhowe DW. Posttraumatic Nonunion of the Proximal Tibial Metaphysis. *American Journal of Orthopaedics* 1999, 28(9):523-528.
8. Chin K, Altman D, Altman G, Tomford W, Lhowe DW. Retrograde Nailing of Femur Fractures in Patients with Myelopathy Who Are Nonambulatory. *Clinical Orthopaedics and Related Research* 2000; 373:218-226.

9. Mithohfer K, Lhowe DW, Altman GT. Delayed Presentation of Acute Thigh Compartment Syndrome After Contusion of the Thigh. *Journal of Orthopaedic Trauma* 2002; 16:436-437.

10. Lhowe DW, Briggs S. Planning for Mass Civilian Casualties Overseas. *IMSuRT – International Medical / Surgical Response Teams. Clinical Orthopaedics and Related Research* 2004; 422:109-113.

11. Mithohfer K, Lhowe DW, Vrahas MS, Altman DT, Altman GT. The Clinical Spectrum of Acute Compartment Syndrome of the Thigh and Its Relation to Associated Injuries. *Clinical Orthopaedics and Related Research* 2004; 425:223-229.

PROCEEDINGS OF MEETINGS

Presentations

1. Lhowe DW, Hansen ST. Immediate Intramedullary Nailing of Open Femur Fractures. *American Academy of Orthopaedic Surgeons Annual Meeting, San Francisco* 26 Jan 1987.

Posters

1. Rodgers WB, Kharrazi FD, Waters PM, Kennedy JG, McKee M, Lhowe DW. The Use of Osseous Suture Anchors in the Treatment of Severe, Complicated Elbow Dislocations. *Orthopaedic Trauma Association Annual Meeting, Tampa* 1995.

2. Rodgers WB, Lhowe DW. Retrograde Intramedullary Nailing Using the AO Unreamed Tibial Nail: Adjunctive Use of an Existing Implant. *Orthopaedic Trauma Association Annual Meeting, Tampa* 1995.

REVIEWS

1. Lhowe, DW. Basics of Broken Bones for the Non-Orthopaedist. *Emergency Medicine* 1987 Sep 30; 89-111.

2. Lhowe, DW. Office Procedures: Treatment and Referral of Fractures of the Upper Extremity. *Modern Medicine* 1989; 57(9):62-71.

3. Lhowe, DW. Office Procedures : Treatment and Referral of Fractures of the Lower Extremity. *Modern Medicine* 1989; 57(10).

4. Lhowe, DW. Fracture of the Adult Forearm. *Mediguide to Orthopedics* 1990; 9(6):1-5.

5. Lhowe, DW. Hemiarthroplasty for Fracture/Dislocation of the Shoulder. *Strategies in Orthopedics* 1992; 11(1) 1-20.

6. Lhowe, DW. Open Fractures of the Femoral Shaft. *Orthopedic Clinics of North America* 1994; 25:573-9.

TEXTBOOKS

Edited

1. May H, Lhowe DW, et al, eds. *Emergency Medicine*. 2nd ed. Boston: Little Brown, 1991.

Chapters

1. Hansen ST, Lhowe DW. Diaphyseal Fractures of the Femur. In: Chapman M, ed. *Operative Orthopaedics*. Philadelphia: JB Lippincott, 1988:389-412. (Revised for 2nd edition, 1991:637-650)

2. Lhowe DW. Intracapsular Fractures of the Femur. In: Evarts CMc, ed. *Surgery of the Musculoskeletal System*. 2nd ed. New York: Churchill Livingstone, 1990: 2549-92.

3. Lhowe DW. Fractures of the Patella. In: Siliski JM, ed. *Traumatic Disorders of the Knee*. New York: Springer-Verlag, 1994: 159-165.

4. Lhowe DW. Extensor Mechanism Disruptions. In: Siliski JM, ed. *Traumatic Disorders of the Knee*. New York: Springer-Verlag, 1994:169-174.

5. Lhowe DW, Bom CT. Extremity Injuries. In: Briggs S, ed. *Advanced Disaster Medical Response. Manual for Providers*. Boston: Harvard Medical International, 2003:103-111.

6. Lhowe DW. Orthopedic Trauma : Extremity Fractures. In: Sheridan RL, ed. *The Trauma Handbook of The Massachusetts General Hospital*. Philadelphia: Lippincott Williams & Wilkins, 2004: 526-539.

VIDEOTAPE

1. Lhowe DW. Hemiarthroplasty for Fracture/Dislocation of the Shoulder - Surgical Technique. Learning Technology Incorporated, 1992.